

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Sharon Petersen,

Complainant,

PROBABLE CAUSE ORDER

v.

Linda Phillips,

Respondent.

The above-entitled matter came on for a probable cause hearing before Administrative Law Judge James E. LaFave on March 6, 2014. This matter was convened to consider a campaign complaint filed under the Fair Campaign Practices Act by Sharon Petersen on February 27, 2014. The probable cause hearing was conducted by telephone conference call. The probable cause record closed on March 6, 2014.

Sharon Petersen (Complainant) appeared on her own behalf and without counsel. Robert G. Suk, Robert G. Suk Law Offices, appeared on behalf of Linda Phillips (Respondent).

Based upon the record and all the proceedings in this matter, and for the reasons set forth in the attached Memorandum incorporated herein, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. There is probable cause to believe that Respondent Linda Phillips violated Minnesota Statutes § 211B.04 by failing to include a disclaimer on a campaign flyer mailed to constituents and on advertisements published in the *Byron Review* on February 25, 2014 and March 4, 2014.

2. There is no probable cause to believe that Respondent Linda Phillips violated Minn. Stat. § 211B.04 in connection with campaign signs that Bryce DeCook and Ronald Tiede prepared and disseminated in support of Ms. Phillips' candidacy for Salem Township Clerk. This claim is **DISMISSED**.

3. This matter is referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges, pursuant to Minn. Stat. § 211B.35.

4. Should the Parties decide that this matter may be submitted to the assigned Panel of Judges based on this Order and the record created at the Probable Cause hearing, without an evidentiary hearing, they should notify the undersigned Administrative Law Judge by **4:30 p.m. on Monday, March 17, 2014**. If both Parties do not agree to waive their right to an evidentiary hearing, this matter will be scheduled for an evidentiary hearing in the near future.

Dated: March 11, 2014

s/James E. LaFave

JAMES E. LAFAVE
Administrative Law Judge

MEMORANDUM

Factual Background

Complainant Sharon Petersen is the incumbent candidate for Salem Township Clerk. Ms. Petersen is being challenged in the March 11, 2014, election by Respondent Linda Phillips.

On February 27, 2014, the Complainant filed this Complaint alleging that Ms. Phillips prepared and disseminated a campaign flyer and lawn signs promoting her candidacy for Salem Township Clerk that lacked the disclaimer required by Minn. Stat. § 211B.04.¹ Prior to the probable cause hearing, the Complainant submitted copies of advertisements promoting Ms. Phillips's candidacy that also lacked disclaimers required by Minn. Stat. § 211B.04.² The advertisements were published in the *Byron Review* on February 25 and March 4, 2014.³

In response to the Complaint, Ms. Phillips argues that the campaign flyer falls within the exception contained in the statute for "personal letters that are clearly being sent by the candidate"⁴ and therefore was not required to include a disclaimer. Ms. Phillips also asserts, with respect to the newspaper advertisements, that it is the newspaper's responsibility to include a disclaimer with the advertisements and that *Byron Review* failed to do so. Finally, Ms. Phillips states that she did not participate in the preparation or dissemination of the lawn signs. Instead, the lawn signs were

¹ Complaint and Complaint Exhibits A-C.

² Exs. 1-4.

³ *Id.*

⁴ Testimony (Test.) of Linda Phillips. See, Minn. Stat. § 211B.04(e).

prepared and disseminated by a Bryce DeCook and Ronald Tiede, and the signs fall within the exemption for material prepared by individuals who act independently of the candidate.⁵

Legal Standard

The purpose of a probable cause determination is to determine whether, given the facts disclosed by the record, it is fair and reasonable to hear the matter on the merits.⁶ If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, a motion to dismiss for lack of probable cause should be denied.⁷ A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony. As applied to these proceedings, a probable cause hearing is not a preview or a mini-version of a hearing on the merits; its function is simply to determine whether the facts available establish a reasonable belief that the Respondent has committed a violation. At a hearing on the merits, a panel has the benefit of a more fully developed record and the ability to make credibility determinations in evaluating whether a violation has been proved, considering the record as a whole and the applicable evidentiary burdens and standards.

Analysis

Minnesota Statutes § 211B.04 requires persons “who participate in the preparation or dissemination” of “campaign material” to “prominently” include the name and address of the person or committee causing the material to be prepared or disseminated.⁸ The disclaimer is required to provide the name and address of the candidate's committee that prepared and paid for the signs and must read substantially as follows: “Prepared and paid for by the _____ committee _____ (address).”⁹ Campaign material is defined in relevant part as any material disseminated for the purpose of influencing voting.¹⁰

⁵ Test. of L. Phillips; See, Minn. Stat. § 211B.04(f).

⁶ *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

⁷ *Id.* at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. See, e.g., Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the standard for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

⁸ Minn. Stat. § 211B.01, Subd. 2 defines “campaign material” to mean “any literature, publication, or material that is disseminated for the purpose of influencing voting at a primary or other election, except for news items or editorial comments by the news media.”

⁹ Minn. Stat. § 211B.04.

¹⁰ Minn. Stat. § 211B.01, subd. 2.

The flyer,¹¹ newspaper advertisements,¹² and campaign signs¹³ promoting the Respondent's candidacy all meet the definition of "campaign material"¹⁴ and all lacked a disclaimer substantially in the form required under Minn. Stat. § 211B.04.

Each allegation is considered below.

a. The flyer

The Respondent testified that she prepared and mailed the flyer to residents of Salem Township. She maintains, however, that the flyer is a "letter" and that it falls within the exception under § 211B.04(e) for "personal letters that are clearly being sent by the candidate." According to the Respondent, she drafted this "letter" to introduce herself to Salem Township residents and detail her personal and professional information.

A copy of the campaign material at issue appears below:

¹¹ Complaint Ex. A.

¹² Complaint Exs. 1-4.

¹³ Complaint Exs. B and C.

¹⁴ See Minn. Stat. § 211B.01, Subd. 2, Minn. Stat. § 211B.04.



Vote: March 11, 2014



**At Salem Town Hall
Salem Corners
County Rd 3 and Salem Rd SW**

Linda Phillips

For

Salem Township Clerk

*"I will bring transparency and clarity to the workings of the township
which will enable residents to make informed choices and decisions"*

Personal Information:

- Resident of Salem Township since 2001
- Married to husband, Jay
- Mother of two
- Enjoys scrapbooking, gardening, sewing, quilting, reading, traveling, and camping.
- Currently retired

Professional Information:

- Medical Secretary - OMC
- Executive Assistant - Premier Bank
- Sales and Catering - Kahler Hotel
- Regional Assistant - American Heart Association
- Administrative Assistant - OMC

***Vote on Tuesday, March 11, 2014
7:00 AM until 8:00 PM

**Approved by Linda Phillips

Σ A

The Administrative Law Judge finds that the above campaign material, identified as Complaint Ex. A, is a flyer and not a "personal letter." The phrase "personal letter" suggests individualized correspondence to a specific individual. The flyer in question contains no personal greeting or salutation, no signature, and was mailed to all citizens of Salem Township. It encourages recipients to vote for the Respondent on March 11, 2014, and includes the caveat: "Approved by Linda Phillips." The document is clearly a campaign flyer and not a "personal letter." It therefore does not fall within the exception to the disclaimer requirement provided at Minn. Stat. § 211B.04(e).

The Administrative Law Judge finds that the Complainant has put forward sufficient facts to support finding probable cause that Respondent Linda Phillips violated Minn. Stat. § 211B.04 by failing to prominently include a disclaimer on the flyer substantially in the form required under Minn. Stat. § 211B.04(b).

b. The campaign signs

Campaign signs promoting the Respondent's candidacy for Township clerk were placed throughout Salem Township. The signs read:

For A Better Township
Vote Phillips (diagonal on the sign)
Jay for Supervisor Linda for Clerk
March 11, 2014 7:00 AM-8:00 PM¹⁵

The signs do not include a disclaimer or indicate who prepared or paid for the sign.

At the probable cause hearing, Mr. Bryce DeCook testified that he, alone, was responsible for these signs.¹⁶ Mr. DeCook stated that he designed the signs, with help from staff at Office Max, and paid for the signs with his own money.¹⁷ Mr. DeCook testified that he spent approximately \$400 for 18 two-sided signs.¹⁸ Mr. DeCook testified that he placed the signs throughout Salem Township after obtaining permission from the various land owners.¹⁹ Both Mr. DeCook and the Respondent testified that the Respondent did not participate in the preparation or placement of the signs and, in fact, was not even aware that the signs were being made and distributed.²⁰

Ronald Tiede also provided testimony that he prepared signs promoting the Respondent's candidacy. Like Mr. DeCook, Mr. Tiede stated that he prepared, paid for, and distributed the signs on his own without any participation or knowledge of the Respondent.²¹ Mr. Tiede stated that he spent \$125 for 14 signs and posted about 12 signs throughout the Township.²²

Based on the testimony of Mr. DeCook and Mr. Tiede, the Respondent argues the Complainant has failed to allege a violation of Minn. Stat. § 211B.04 with respect to the campaign signs. The Respondent asserts that she did not participate in the preparation or distribution of the signs and instead, Mr. DeCook and Mr. Tiede acted independently of her campaign in creating and posting the signs.²³ The Respondent also notes that Minn. Stat. § 211B.04(f) provides an exception to the disclaimer

¹⁵ Complaint Ex. A.

¹⁶ Test. of Bryce DeCook.

¹⁷ Test. of B. DeCook.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Test. of Respondent and B. DeCook.

²¹ Test. of R. Tiede.

²² *Id.*

²³ Test. of L. Phillips.

requirement for individuals who act independently of a candidate and who spend less than \$2,000 of their own money to produce or distribute campaign material.

The Complainant conceded at the probable cause hearing that she had no idea who prepared or distributed the lawn signs.

The Administrative Law Judge finds that the Complainant has failed to allege sufficient facts to support finding probable cause that Respondent Phillips violated Minn. Stat. § 211B.04 with respect to the campaign lawn signs. There is no evidence that Respondent prepared or disseminated the lawn signs at issue. This allegation is dismissed.

c. The newspaper advertisements

Respondent placed campaign advertisements in the local newspaper, *Byron Review*, that were published in the paper's February 25, and March 4, 2014 editions.²⁴ The advertisement that was published on February 25, 2014 read:

Elect
Jay Phillips, Salem Twp Supervisor
"The right experience, the right choice"
Linda Phillips, Salem Twp Clerk
"Because principal matters ..."
Vote: March 11, 2014²⁵

The advertisement did not include a disclaimer indicating who prepared or paid for the advertisement.

The Respondent testified that she provided the wording for the advertisement to an "inexperienced employee" at the newspaper and assumed that the employee would include the disclaimer. The Respondent thus maintains that the lack of a disclaimer in the advertisements is the fault of the newspaper. When asked at the hearing if she provided the newspaper employee with her address or the address of her committee for the disclaimer, Ms. Phillips responded only that the newspaper employee never asked her for an address.²⁶

The advertisement published in the March 4, 2014 edition of the *Byron Review* was identical to the one published in the February 25th edition, except that at the very bottom of the advertisement, in smaller font is the phrase "Paid Advertisement."²⁷ Ms. Phillips testified that the *Byron Review* "got it right" on March 4, 2014.²⁸

²⁴ Test. L. Phillips; See, Exs. 1-4.

²⁵ Exs. 3 and 4.(Emphasis in the original).

²⁶ Test. L. Phillips.

²⁷ Exs. 1 and 2.

²⁸ Test. of L. Phillips.

It appears that the Respondent is confusing the newspaper's obligation under Minn. Stat. § 211B.05, subd. 1, to include the phrase "PAID ADVERTISEMENT" at the beginning or end of any advertisement accepted for publication, with her obligation under § 211B.04 to include a disclaimer identifying who prepared and paid for the campaign material.

The Complainant has put forth sufficient facts to support finding probable cause that the Respondent violated Minn. Stat. § 211B.04 with respect to the newspaper advertisements published in the *Byron Review*.

Conclusion

The Administrative Law Judge concludes that based on the record presented, the Complainant has demonstrated probable cause to believe that Respondent violated Minn. Stat. § 211B.04 with respect to the campaign flyer and the newspaper advertisements printed in the *Byron Review*. It is reasonable to require the Respondent to go to hearing on the merits and to allow a panel of three Administrative Law Judges to determine whether the Respondent violated Minn. Stat. § 211B.04, and if so, what penalty is appropriate. The allegation concerning the lawn signs is dismissed.

Should the Parties decide to waive the evidentiary hearing and submit the matter on the record made at the Probable Cause hearing with further written submissions, they must notify the ALJ by the date and time stated in the Order.

J. E. L.